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Painting the Path to Art Restitution in Red, White, and Blue: The American Judicial System's
Pivotal Role in World War II Art Restitution

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Abstract

This thesis focuses on the United States' role in the restitution of art looted during World War II and its impact on the international art restitution field. The study analyzes the historical background of international art restitution and the unique position of the United States legal system. It highlights the complexities and challenges associated with the restitution of Nazi-looted art. The research examines two significant U.S. Supreme Court cases, *Austria v. Altmann* and *Cassirer v. Thyssen-Bornemisza Collection Foundation*, and the application of the Foreign Sovereign Immunities Act (FSIA) to showcase the impact of the U.S. judicial system on global art restitution efforts. The thesis argues that the U.S. has played a crucial role in facilitating the return of stolen artworks to their rightful owners. While the effectiveness of the U.S. judicial system in influencing international restitution practices varies, the provision of avenues for individuals to pursue restitution marks a groundbreaking advancement. The analysis of these cases reveals the limitations and possibilities within the U.S. legal framework for addressing complex international restitution cases. By examining the international influence of U.S. court rulings and the ongoing challenges in the restitution of looted art, the study highlights the United States' significant and nuanced contribution to the global pursuit of justice for victims of art theft.

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Introduction

In the realm of World War II Europe, the Nazis' programmatic overhaul of German society took many forms, going beyond the well-known tactics of war and mass death associated with the Third Reich. Art played a pivotal and fundamental role in the Nazi agenda; its importance extended past Adolf Hitler's personal failures in art to a broader, systematic reshaping of society through the control of cultural assets.

During World War II, the Nazis conducted a vast looting campaign, confiscating between 650,000 and 5 million artworks across Europe.¹ This plunder was driven by various motives: ideological and racial policies that mandated the removal of "degenerate art" from German society, targeting works by modernist, Jewish, or Communist artists for destruction, ridicule, or sale.² High-ranking officials such as Adolf Hitler and Hermann Göring amassed enormous collections, both for personal enrichment and to assert cultural supremacy.³ Art also served as economic capital, being sold or traded to fund Nazi operations and generate revenue. Furthermore, the Nazis aimed for cultural imperialism, intending to centralize Europe's finest artworks in German museums, particularly with plans for the "Führermuseum" in Linz, Austria. Organized units like the Einsatzstab Reichsleiter Rosenberg (ERR) specifically targeted cultural treasures in occupied territories.⁴ However, the extensive looting during the war left many artworks unrecovered, leading to ongoing restitution efforts and legal battles to return them to their rightful owners. However, a paradox emerged in the post-war period: certain paintings,

¹ Robert M. Edsel. *Rescuing Da Vinci: Hitler and the Nazis Stole Europe's Great Art: America and Her Allies Recovered It* (Dallas: Laurel Pub., 2006), 107.

² "‘Degenerate’ Art," Holocaust Encyclopedia, United States Holocaust Memorial Museum, last modified June 20, 2020, <https://encyclopedia.ushmm.org/content/en/article/degenerate-art-1#nazification-of-german-culture-0>.

³ Anne Rothfeld, "The Holocaust Records Preservation Project," *Prologue Magazine*, Vol. 34, No. 2, (Summer 2002), <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1>.

⁴ *Ibid.*

unequivocally acknowledged as stolen by the Nazis, still have not been returned to the families from whom they were seized. Instead of a unified and coherent resolution process, the post-war international landscape has seen disjointed and sporadic efforts in art restitution. The victorious Allies, especially the United States, committed significant resources to restating stolen art, establishing legal principles amid WWII's tragedy. Yet, proactive reclamation of art remained scarce for decades.

This thesis delves into the significant role the United States has played in the restitution of art looted during WWII and its impact on the international art restitution arena. By analyzing the historical backdrop of international art restitution and the unique stance of the U.S. legal system, this study underscores the complexities and challenges associated with the restitution of Nazi-looted art. This thesis argues that the United States has been instrumental in facilitating the return of stolen artworks to their rightful owners, marking a significant advancement in international justice. Through a detailed examination of art restitution cases, the thesis not only illustrates the direct impact of U.S. court rulings on international art restitution practices but also illuminates the broader implications for victims of art theft worldwide. By addressing both the successes and ongoing challenges in the restitution of looted art, this paper highlights the nuanced yet critical contribution of the United States to the global pursuit of justice in art restitution.

Chapter 1 explores the complex journey of international art restitution, tracing its evolution from historical precedents to modern legal structures. It traces ethical standards for dealing with looted art, from the informal recognition of *jus praedae* or "prize right" to legally non-binding formal international agreements to protect cultural property. It sets the stage for understanding the complications of returning looted art to its rightful owners. Chapter 2 focuses

on the United States' determination to mediate art restitution cases within its unique judiciary system by analyzing landmark cases, including *Bernstein v. Van Heyghen Freres Societe Anonyme* and *U.S. v. Portrait of Wally*. It illustrates how U.S. courts have addressed jurisdictional issues in restitution matters and the development and implications of the Foreign Sovereign Immunities Act (FSIA) of 1976. It emphasizes the federal government's historical role in establishing a precedent for hearing restitution claims in the United States.

Chapter 3 offers a detailed examination of the application of the FSIA in art restitution cases, with a specific focus on *Austria v. Altmann*. This case, which involved a dispute over the ownership of paintings by Gustav Klimt, exemplifies the opportunity presented by the FSIA in resolving complex restitution claims. The chapter explores the legal arguments, court rulings, and broader implications of the case for the field of art restitution. Through this key case study, the chapter illustrates the transformative impact of FSIA on the landscape of art restitution.

Chapter 4 addresses the limitations of the FSIA through the lens of *Cassirer v. Thyssen-Bornemisza Collection Foundation*. This case, which revolves around a painting looted by the Nazis and later acquired by a Spanish museum, highlights the constraints in applying U.S. law to known stolen artworks. Nevertheless, its global impact underscores its significance within the broader context of art restitution, as it gained international attention and created an international call for the painting's restitution.

Chapter 1: Art Under Siege: The Historical Background and Complexities of International Restitution Litigation

a. *The History of International Art Restitution*

The Consequences of War, a painting by Paul Rubens and finished in 1639, echoes haunting parallels almost four centuries later. At its core stands Mars, the Roman God of war, clad in armor and clutching a bloodied sword as he surges toward the Temple of Janus. In times of peace, the temple's gates remain closed, but in this artwork, they stand wide open, symbolizing the unleashing of catastrophe. A grim pile of helpless victims lies on the brink of being trampled, among them a distressed mother whose face contorts in terror as she shields her weeping child from the havoc wrought by Mars. Two figures have already fallen in Mars' path, awaiting their inevitable destruction. The woman personifying harmony lies beside her shattered lute in disarray, while next to her, a man, symbolizing architecture, is flung to the ground and crumbles into ruin under the relentless force of Mars. Amidst the depicted devastation, Venus stands as a last beacon of hope, a stark contrast to the dark and red-clad Mars. She wraps her arms around him, desperately attempting to restrain and pull him away from the victims in his path. However, Mars pays little heed to her, symbolizing how love fades into insignificance as fury consumes him. As Mars advances, he leaves a young woman in a tattered black dress behind. Her arms are raised to the sky, cheeks stained with tears, her expression embodying sheer devastation. This woman, identified as 'l'infelice Europa' by Rubens in a letter to a fellow artist, represents “the unfortunate Europe who, for so many years now, has endured pillage, violation, and suffering.”⁵

Unknown to Rubens, his painting would act as a premonition depicting Europe three hundred years later. World War II (WWII) stands as an unparalleled horror in human history,

⁵ Paul Rubens, *Die Briefe des P. P. Rubens*, Letter no. CCXVIII, p. 461-463, after the Italian original, [in:] Bottari Raccolta di Lettere sulla Pittura, Scultura et Architectura, Milano 1822, p. 525, 1918. translated by Vienna O. Zo.

characterized by an overwhelming scale of human rights violations and systematic cultural pillaging. The war bore witness to unspeakable atrocities, most notably the Holocaust, where millions of innocent lives were methodically exterminated. It also involved mass civilian displacements, forced labor, and numerous other human rights transgressions. In the realm of culture, the Nazis systematically looted art and cultural treasures. The establishment of the Einsatzstab Reichsleiter Rosenberg (ERR), the principal agency responsible for this looting, exemplified that at the “highest level, Nazis saw the creation, treatment, and possession of art as part of their worldview.”⁶ This cultural plunder, coupled with the widespread destruction of historical landmarks and cities, emphasized the war's devastating impact on the world's shared culture. As depicted by Rubens, innocent victims fell during the war, but culture also lay crushed under its devastation. Without a globally binding legal framework, countries cannot effectively begin to fix these atrocities, much less be held accountable for their actions. Art restitution is even more complex and seemingly impossible as it falls between morally binding obligations and legally non-binding principles.

Until the late 19th century, the concept of *jus praedae*, or "prize right," held informal recognition as the international norm.

The exercise of the *ius praedae* was possible only through a *bellum iustum*—namely, a just, fairly declared war, which was considered an *iusta causa* (right cause) to legitimate the acquisition of possession over men and goods. The act of plundering (*direptio*) was an actual method of acquiring ownership of *res hostium*—namely, the enemies' movables.⁷

During a period when international legal agreements were nonexistent, this early approach to international law provided a practical justification for the historic transfer of wealth after military

⁶ Nicholas O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted Art*, American Bar Association, 2017, p. 3

⁷ Giuditta Giardini, “The History of *Ius Praedae* and Its Decline | the Columbia Journal of Law & the Arts”. *The Columbia Journal of Law & the Arts*. August 2, 2019, <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/118>.

conflicts. Treaties were brought forth to try and evolve this international precedent. The Brussels Declaration of 1874, which was not officially approved, established the basic rules of war. This set the stage for later international agreements that sought to end the practice of seizing enemy property as prizes and to protect certain movable assets and buildings not involved in war. The Hague Convention of 1907 protected “buildings devoted to religion, art, science, charitable causes, historic landmarks, and hospitals from bombardment, provided they were not being utilized for military purposes at the time.”⁸ Additionally, it obligated the protection of private property from confiscation.⁹ These agreements didn't specifically mention the protection of cultural private property because, at that time, the systematic military theft of art and cultural items was not yet a recognized issue.

WWII changed this state as it witnessed years of occupation and arts appropriation. The United Kingdom and sixteen other states sought to address the gaps in the protections provided by previous treaties.¹⁰ Together, they issued the International Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation and Control, since then known as the London Declaration:

The Governments...Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.¹¹

⁸ Erik Nadeau, Christina Echeona, “Art Theft and Modern Restitution in International Law.” *SCBC*, April 28, 2023, <https://www.scbc-law.org/post/art-theft-and-modern-restitution-in-international-law>.

⁹ *Ibid.*

¹⁰ Foreign Relations of the United States: Diplomatic Papers, General, Volume I, Document 456. Office of the Historian, Foreign Service Institute United States Department of State. 1943. <https://history.state.gov/historicaldocuments/frus1943v01/d456>.

The sixteen other states: Belgium, Canada, China, the Czechoslovak Republic, the French National Committee, Greece, India, Luxemburg, the Netherlands, New Zealand, Norway, Poland, the Soviet Union, the Union of South Africa, the United States of America, Australia, the United Kingdom of Great Britain and Northern Ireland, and Yugoslavia.

¹¹ *Ibid.*

The intention of the Allied forces became clear: to end the looting of those who had suffered unjustly in this conflict.

b. The Inadequate International Response to WWII Looted Art

In a cruel irony, *The Consequences of War* by Paul Rubens survived the war, while Ruben's *Venus Disarming Mars*, a beautiful painting depicting peace, was stolen. Currently, the painting is on display at the State Hermitage Museum in St Petersburg, and its history represents the complexity and pendulum nature of WWII art restitution. In 2004, the Hermitage,¹² the formerly secret storage space for art taken from Germany after World War II, was opened, revealing the lost painting *Venus Disarming Mars*. It is believed to have been looted by Soviet troops from the Königsberg Castle, East Prussia, in 1945.¹³ While the primary focus of the Allied forces during World War II was not the systematic theft of art and cultural artefacts as seen with the Nazis, there were instances of artworks and cultural objects being relocated, requisitioned, or taken during the war for various reasons. The multifaceted nature of these actions by the Allied forces presents challenges in the restitution process. Determining the rightful ownership history and assessing the circumstances under which these objects were moved becomes complex. It's important to distinguish between the motives behind the actions of the Axis Powers, particularly the Nazis, and those of the Allied forces. The Nazis systematically looted art and cultural objects for their personal gain and ideological purposes, including the creation of the Führermuseum in Linz, Austria.¹⁴

¹² Dennis Driessen, "St Petersburg: Rubens Looted from Germany Discovered at Hermitage," *CODART*, December 20, 2004, <https://www.codart.nl/museums/st-petersburg-rubens-looted-from-germany-discovered-at-hermitage/>.

¹³ *Ibid.*

¹⁴ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 14.

An organization devoted to identifying and seizing art works by any means necessary for the purpose of creating the Führermuseum, a museum meant to display the most celebrated works of art in Europe. While unrealized, the project cultivated an unparalleled repository of stolen European culture.

In response to this direct assault on culture, the international dialogue continued, and the Hague Convention in 1954 for the Protection of Cultural Property in the Event of Armed Conflict sought to expand on the preexisting 1907 treaty.¹⁵ In 1954, this treaty addressed and safeguarded cultural property during armed conflict. It nullified all Nazi property transfers involving seized artworks and outlined measures to prevent the destruction of art and other facets of cultural heritage during wartime.¹⁶ The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention in 1970 became the initial international convention to directly address the issue of art theft occurring outside the conventional context of warfare.¹⁷ The treaty was a response to the proliferation of the black market for stolen cultural artefacts that had emerged in Europe. In 1995 the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects resolved the problem of restitution claims being barred by statutes of limitations and provided equitable compensation to bona fide (in good faith) purchases of such objects for their losses.¹⁸ While these treaties established international legal mandates for the return of wrongfully appropriated cultural and artistic property, they suffer from the absence of self-execution and retroactive applicability. These treaties remain ineffective without active enforcement by a nation's domestic laws. The need for individual scrutiny of each treaty to apply retroactive potential further compounds the challenges of treaty interpretation, hindering proper art restitution.

Venus Disarming Mars acts as an example of the lack of authority these treaties hold. Thought to be lost for centuries to only resurface in the hands of a signatory of the London

¹⁵ Nadeau, "Art Theft and Modern Restitution in International Law."

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

Declaration with no hope to be returned, it serves as a poignant reminder of the multifaceted challenges surrounding art restitution. The vast scale of plunder, coupled with issues such as missing or incomplete documentation and the passage of time, has significantly impeded the fulfillment of promises made by the Allied forces during and after World War II. Nonetheless, the most significant impediment to art restitution is the intricate tangle of international legal and political convolutedness, resulting in the absence of a binding international legal framework. This challenge does not diminish the urgent necessity to hold countries accountable for upholding the commitments they have made. Amid the intricate complexities of art restitution in the aftermath of World War II, the domestic judiciary system emerges as a small lifeline, promising hope in restoring art to its rightful owners. In today's interconnected global society, the actions of a nation within its borders can reverberate far beyond its national boundaries. The United States, with its historical involvement in restitution efforts and the distinctive characteristics of its legal system, emerges as one of the most well-equipped nations for handling art restitution cases. Furthermore, its substantial global influence lends international credibility to those seeking restitution, which could encourage other countries to take action and correct historical injustices related to looted art.

c. The United States Role in International Art Restitution

The United States, recognizing the limitations and gaps in existing treaties, took it upon itself to champion diplomacy in the pursuit of art restitution. In late 1998, the U.S. Department of State orchestrated the Washington Conference on Holocaust-Era Assets. Over 400 representatives from 43 countries, alongside participants from non-governmental organizations, gathered with renewed determination and vigor. The conference aimed to uphold the principle of equitable

restitution. U.S. Secretary Madeleine K. Albright identified the imperatives of the conference as a crucial step in readdressing the complexities surrounding art restitution.

(1) the pursuit of justice, even if relative; (2) openness and full access to archives and records; (3) the obligation to seek truth; (4) the urgency created by the passage of time; and (5)... a 'twin purpose' to 'forge a common approach to the issues still surrounding Holocaust assets,' and 'to advance Holocaust education, remembrance and research.'¹⁹ This initiative marked a notable effort to address the limitations of existing treaties and strengthen the commitment to rectifying historical injustices related to wrongfully appropriated cultural and artistic property. The U.S. government's active role in hosting such a conference signaled its continued support for fostering international collaboration and diplomacy in the realm of art restitution. At the conference, each participating country had a representative issue a statement or submission outlining their individual approaches to addressing the restitution of Holocaust-era assets, cultivating in eleven general aggregated upon principles:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be

¹⁹ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 30.

- taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.
 10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
 11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.²⁰

These principles marked a step forward in international resolution and symbolized global cooperation in addressing the horrors of stolen property. However, the conference organizer and then U.S. Under Secretary of State for Economic, Business, and Agricultural Affairs, Stuart Eizenstat underscored that these principles were intentionally not designed as a definitive solution. Instead, they were intended to serve as a flexible framework for nations to develop their own approaches in accordance with their unique legal systems, acting as an indication of the U.S.'s recognition of the inherent limitations of international agreements.²¹

Following the Washington Conference of 1998, these principles did indeed influence international dialogue. During the 2000 Vilnius International Forum on Holocaust-Era Looted Cultural Assets, with 38 countries in attendance, including the United States, participating nations committed to taking "reasonable measures" to implement the principles established at the Washington Conference and to promote domestic legislation that would facilitate the identification and return of Nazi-looted cultural assets.²² The Washington conference highlighted the extent of influence wielded by the United States within the international system, but it also underscored the recurring insufficiency of international agreements. Many promises

²⁰ The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998.

²¹ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 40.

²² Commission for Looted Art in Europe, "Vilnius Forum Declaration."

have been made by multiple countries since WWII; however, each agreement lacked legal enforcement, reigniting challenges from prior treaties. Throughout its history, the United States has emerged as a leader in art restitution by utilizing its international influence and facilitating opportunities to take legal action against international sovereign states. In the realm of art restitution, with failing diplomatic measures, the judiciary remains the only reliable recourse for the United States.

Chapter 2: Means To Get Into Court: The Distinctive Role of the U.S. Judiciary in Art

Pursuing legal action for art restitution is challenging due to conflicts between sovereignty and justice. Moreover, international treaties that hold independent nations responsible have proven unsuccessful in paving an optimal path for restitution. However, the United States offers a unique opportunity for individuals seeking restitution through legal precedent.

Chapter 2 focuses on the distinct legal stage of the United States and will discuss two pivotal cases: *Bernstein v. Van Heyghen Freres Societe Anonyme* and *U.S. v. Portrait of Wally*. These cases, though separated by decades, are united in their unprecedented government intervention. They highlight the United States' dedication to seeking justice for property wrongfully taken during WWII.

The case of *Bernstein v. Van Heyghen Freres Societe Anonyme* questioned the legal concept of sovereignty and paved the way for lawsuits seeking the rightful ownership of stolen works of art. During this period, the executive branch unquestionably cemented its role as a champion of justice for art restitution through its declaration to stand with victims of the Holocaust. On the other hand, the *U.S. v. Portrait of Wally* is a modern-day case that, coupled with media attention and government intervention, raised fundamental questions about art restitution and the involvement of the United States.

By highlighting the distinctive events that led to each case and the legal system's capacity to handle such cases. This chapter aims to prove the US' dedication to art restitution and its unique ability to provide it.

a. *The Legal Evolution Leading to the Foreign Sovereign Immunities Act (FSIA)*

Art is typically considered private property governed by civil law frameworks. However, the matter becomes more complicated regarding art or private property taken during WWII as the

objects in question have crossed national borders. As demonstrated prior, the concept of restitution and in particular art restitution, is an internationally new concept, therefore, there is a lack of precedent. In the absence of precedent, legislation is what is left, and sovereignty laws prioritize a nation's autonomy, often preventing judicial intervention.

This became the main hurdle that the United States encountered in 1947 during *Bernstein v. Van Heyghen Freres Societe Anonyme*. The challenge stemmed from the involvement of international sovereigns. In addressing these issues, the Act of State Doctrine considers the principle of sovereign immunity. Under this doctrine, other countries retain absolute immunity in the U.S. legal system and international law.²³ The doctrine states that the judiciary of one country should abstain from questioning or interfering with the legality of public acts, such as legislation or executive actions, carried out by another sovereign state.²⁴ Thus, the courts of one country can not pass judgment on the internal actions or decisions of another country's government within its borders. Due to this doctrine, the main question in *Bernstein v. Van Heyghen Freres Societe Anonyme* was whether or not a United States court could hear the case as it involved intentional sovereigns.

In 1937, Arnold Bernstein was detained by Nazi officials in Germany. He was coerced and threatened until he agreed to transfer ownership of his shipping interests, including the ship Van Heyghen Freres Société Anonyme, shares of the Arnold Bernstein Line and Gandia, to a designated Nazi representative named Marius Boeger. Later in 1942, the ship sank, and Marius

²³ Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?*, 13 Md. J. Int'l L. 247 (1989), 247, <http://digitalcommons.law.umaryland.edu/mjil/vol13/iss2/4>.

In *Underhill v. Hernandez* (1879), the United States Supreme Court set the precedent and created the terminology for an "absolute" view of the Act of State Doctrine by holding that United States courts could not question the act of a foreign government.

²⁴ Michael Zander, "The Act of State Doctrine" *The American Journal of International Law* 53, no. 4 (1959): 831. <https://doi.org/10.2307/2195753>.

Boege received insurance compensation for the loss. In response, Bernstein initiated legal action in the United States to recover his property and the insurance money. However, the court dismissed his complaint. The case was dismissed because the court determined that it did not have the power to proceed with the lawsuit. The court clarified that despite the possible existence of New York state laws that nullified the transfer of the plaintiff's shares, the court is not authorized to enforce them.²⁵ The court stated that the restoration of the shares is reserved for Germany since the event occurred there. It is worth noting that the court concluded that there was no evidence to suggest that the Executive intended to relax the Act of State doctrine.²⁶ The court looked to the Executive branch to determine this, as this branch typically handles issues related to sovereignty through its diplomatic powers. In other words: the court had no power to act.

However, in alignment with the United States vigorous defense of victims related to the Holocaust, on April 13, 1949, the State Department issued Press Release No. 296 titled "Jurisdiction of United States Courts Regarding Suits for Identifiable Property Involved in Nazi Forced Transfers," authored by Jake B. Tate, Acting Legal Advisor at the Department of State. This document acted as the Executive's stance concerning restitution. It stated that the

Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and set forth that the policy of the executive with respect to claims asserted in the United States for restitution of such property is to relieve American courts from any restitution upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.²⁷

²⁵ William W Bishop, "Bernstein v. Van Heyghen Freres Societe Anonyme," *The American Journal of International Law* 42, no. 1 (1948): 217. <https://doi.org/10.2307/2193593>.

²⁶ Ibid.

²⁷ John M. Niehuss S.Ed., "International Law-Sovereign Immunity-The First Decade of the Tate Letter Policy", *Mich. L. Rev.* vol. 60. 1142 1142 (1962).

The Act of State doctrine is based on respecting and cooperating with foreign governments, recognizing their actions and decisions regardless of the outcome or its past. However, in its dealings with Nazi Germany, the United States went against this diplomatic norm, prompting a reassessment of the *Bernstein v. Van Heyghen Freres Societe Anonyme* case under this new perspective. This led to a reversal that allowed the case to proceed and created the foundation for possible future restitution cases.

Bernstein v. Van Heyghen Freres Societe Anonyme and the “Tate Letter” set a precedent that within the “murky intersection between escalating persecution and coercive property transfers,” restitution prevails.²⁸ However, with the expectation of *Menzel v. List*,²⁹ following the national declaration to disregard the Act of State doctrine regarding Nazi looting, the United States courts remained relatively passive on this issue for a half-century.

The "Tate Letter" began the United States' journey to seek resolution for art-related issues and created the dialogue on which most art restitution cases would be based. However, concrete laws for art restitution were still rare. As a result, the legislative branch was under immense pressure to pass a bill promoting restitution. The bill would require a careful and nuanced approach that merges legal principles and diplomatic measures. In the late 1960s, the State Department began to advocate for the waiving of sovereign immunity within the courts in these cases. The challenges encompassed in *Bernstein v. Van Heyghen Freres Societe Anonyme* must be resolved. A proposal was then developed within the State and Justice Departments for

²⁸ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 40.

²⁹ *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966):

The *Menzel v. List* case centered on a Jewish owner's attempt to reclaim a painting that had been stolen by the Nazis and later sold to an unwitting buyer. The court's ruling in *Menzel v. List* declared that the painting was unlawfully taken, setting a significant precedent. This ruling underscored that American courts would treat art looted by the Nazis as they would any other stolen property. Consequently, neither "booty defenses" nor the application of the Act of State doctrine would be permitted in cases involving art looted during the Nazi era. This decision highlights the firm stance of U.S. courts against recognizing any legal exceptions for Nazi-looted art.

nearly a decade, and various legal advisers influenced the direction of the law, although sometimes in different ways.³⁰ With a few amendments made during committee discussions, this proposal evolved into the Foreign Sovereign Immunities Act of 1976.

This act created a new unique feature of the U.S. legal system that allows foreign citizens to file lawsuits within its jurisdiction over actions committed overseas. This act provides a legal pathway for individuals, such as heirs of and Holocaust victims, to seek justice and restitution in the United States. The provisions critical to future restitution can be found in the first paragraph of the law, which states:

- (A) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
- (a) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver,
 - (b) in which the action is based upon a *commercial activity* carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
 - (c) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.³¹

Essentially, the Foreign Sovereign Immunities Act (FSIA) contains exceptions that allow legal proceedings to take place against foreign states, mainly when the defendant displays commercial behaviors. The United States was no longer bound to a doctrine of absolute immunity but had

³⁰ Mark B Feldman, "The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View." *The International and Comparative Law Quarterly* 35, no. 2 (1986): 302–19. <http://www.jstor.org/stable/759230>.

³¹ Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1330(a)

embraced a restrictive approach to sovereign immunity.³² It is important to note that this law created a pathway for legal proceedings rather than establishing any substantive rules; it is up to judicial discretion to rule on matters relating to art restitution.³³ It enables individuals to seek justice for historical wrongs and facilitates the resolution of complex international disputes within the confines of the U.S. legal system.

a. ***Why the U.S. Acts: Legal Precedents in Art Restitution***

In the next chapter, two cases - *Austria v. Altmann* and *Cassirer v. Thyssen-Bornemisza Collection Foundation* - will be examined to demonstrate the importance of effectively empowering individuals with the legal means to initiate lawsuits utilizing the Foreign Sovereign Immunities Act (FSIA). However, a fundamental question regarding the restitution of art within the U.S. judicial system needs to be addressed: Why should the U.S. Government be involved in these cases? Historically, the United States government has taken extensive measures to ensure art restitution. These efforts have ranged from creating military operations to rescue art from the Nazis during World War II³⁴ to overturning centuries of intentional precedent with the Tate Letter. Critics argue that these measures reach too far and that art restitution is a mere title dispute between private individuals and question the allocation of government resources towards

³² Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?*, 281, <http://digitalcommons.law.umaryland.edu/mjil/vol13/iss2/4>.

FISA "codified the Restrictive Theory of Sovereign Immunity." This theory differentiates a state's action done for a "public" purpose and those done for a "commercial" purpose.

³³ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 84.

³⁴ Charles J Kunzelman, "Some Trials, Tribulations, and Successes of the Monuments, Fine Arts and Archives Teams in the European Theatre During WWII." *Military Affairs* 52, no. 2 (1988): 56–60. <https://doi.org/10.2307/1988039>.

During WWII, the Monuments Men were a small specialized group known as the Monuments Fine Arts and Archives teams (MFAA). They were established by the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, authorized by President Roosevelt in August 1943. The group was tasked with protecting cultural objects at risk during the war, especially due to the organized looting and confiscation of art objects by the Third Reich.

it³⁵. This debate surrounding stolen artworks demands a broader examination to demonstrate that the United States' unconventional expressions of power benefit individuals in addressing claims related to Nazi-looted art.

In 1999, the United States implemented its most controversial role in art restitution by seizing the *Portrait of Wally* painting on loan to the Museum of Modern Art in New York from the Leopold Museum in Vienna. The painting, which depicted Schiele's mistress, Wally Neuzil, in a mournful state, was part of a significant Schiele exhibition, and even though the exhibition ended in early 1998, the portrait remained in New York City. The painting's questionable history stemmed from a New York Times article published in 1997 which "alleged that two paintings, *Egon Schiele's Dead City III* and his *Portrait of Wally*...had been looted from their rightful owners after the Nazis' annexation of Austria in 1938."³⁶ The media coverage surrounding the paintings prompted the U.S. Government and Manhattan's district attorney to issue a seizure warrant for the painting. This began the legal process to restore the painting to its rightful owner, commonly referred to as *U.S. v. Portrait of Wally*.³⁷

While a monumental step in the ongoing effort to restore artworks looted by the Nazis, the case also embodies the controversy surrounding the aggressive measures the United States often takes in cases such as this. Some view it as a crucial step in addressing the injustices committed by Nazi Germany and recognize the U.S. government's intervention as a necessary means to provide restitution to victims of the Holocaust. For those directly impacted by past

³⁵ "Statement of Glenn D. Lowry, Director of Museum of Modern Art, New York". Holocaust Assets Hearings Before the H. Comm. on Banking and Financial Services, 106th Cong. 95 (2000).

³⁶ Sophie Lillie, "The Fortunate Possessor: The Case of Gustav Klimt's Beethoven Frieze," *In Rethinking Holocaust Justice: Essays across Disciplines*, edited by Norman J.W. Goda, 1st ed., 265, Berghahn Books, 2020. <https://doi.org/10.2307/j.ctvw048fq.17>.

³⁷ Howard N Spiegler, "Portrait of Wally: The U.S. Government's Role in Recovering Holocaust Looted Art." In *Holocaust Restitution: Perspectives on the Litigation and Its Legacy*, edited by Michael J. Bazylar and Roger P. Alford, 280–87. NYU Press, 2006. <http://www.jstor.org/stable/j.ctt155jjnz.30>.

atrocities, the subpoena represented a long-awaited opportunity to seek restitution for historical wrongs and reflected a commitment to justice and accountability by the United States government.³⁸

On the other hand, contrasting viewpoints exist, as exemplified by Glenn Lowry's testimony before the House Committee on Banking and Financial Services. Lowry, the director of MOMA, states that

the U.S. Justice Department has commenced a forfeiture proceeding to reclaim this alleged heir's painting, politicizing our courts and making it almost impossible to engage in the kind of meticulous and dispassionate research required to ascertain the exact history of this painting immediately before and after the Second World War, and who, today, is its rightful owner... We have seen that the most effective means to resolve problems involving the return of Nazi-looted art requires good faith, discretion, and cooperation between museums and claimants, not the blunt instruments of subpoena power and forfeiture proceedings. For museums and the public, involvement in criminal process is counterproductive.³⁹

However, Lowry's arguments fail to recognize the positive outcomes of the *U.S. v. Portrait of Wally* case. The case proved to be productive in seeking restitution for the Bondi family, who lost their artwork due to Nazi persecution. Using aggressive legal mechanisms such as seizure, the U.S. Government created an opportunity for the Bondi family to reclaim their stolen property and long-awaited justice.

In the late 1930s, after Nazi Germany annexed Austria, Lea Bondi, a Jewish art dealer, was forced to sell her gallery to Friedrich Welz, a Nazi art dealer under Austria's newly enacted "Aryanization" laws that prohibited Jewish business ownership. Bondi owned a painting by Austrian painter Egon Schiele called *Portrait of Wally*, which she managed to keep in her private collection. However, just before Bondi and her husband fled to England, Welz forced himself

³⁸ Lawrence M. Kaye, "A Quick Glance at the Schiele Paintings", 10 DEPAUL-LCA J. ART OF ENT. L & POL'Y 11, 13 (1999).

³⁹ "Statement of Glenn D. Lowry, Director of Museum of Modern Art, New York," Holocaust Assets Hearings Before the H. Comm. on Banking and Financial Services, 106th Cong. 95 (2000).

into their apartment and demanded that Bondi surrender the painting. Faced with coercion and the looming threat of being unable to escape Austria, Bondi reluctantly gave up the painting to Welz.⁴⁰

Around the same time, another Viennese art collector, Dr. Heinrich Rieger, was also forced to sell his collection, which included several works by Schiele, to Welz. Unfortunately, Rieger could not escape the horrors inflicted upon his people and was deported to the Theresienstadt concentration camp, where he died along with the majority of the estimated 150,000 Jews who were sent there.⁴¹ After the war, U.S. military forces arrested Welz in Austria, seizing his private collection of renowned artworks that were taken from Jewish homes, including *Portrait of Wally* and those taken from Rieger. Under the protocol established for art restitution following WWII, these works were transferred to the Austrian Government to return to their rightful owners. However, the *Portrait of Wally* was mistakenly included in the seized Rieger works. The Americans quickly recognized the error and notified the Austrian Government.⁴² Despite this, when the Rieger heirs sold their collection to the Austrian Gallery Belvedere, it included the *Portrait of Wally* mixed with all of Rieger's works. It was later revealed during the *U.S. v. Portrait of Wally* investigations that the Belvedere deliberately took possession of *Portrait of Wally* while aware of the mistake.⁴³

Miles away, living in London, Bondi discovered in 1953 that her painting was in the Belvedere through Dr. Rudolph Leopold, an Austrian Schiele collector. Bondi sought Leopold's

⁴⁰ Howard N. Spiegel, "25. *Portrait of Wally*: The U.S. Government's Role in Recovering Holocaust Looted Art" In *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* edited by Michael J. Bazylar and Roger P. Alford, 280-287. New York, USA: New York University Press, 2005. <https://doi.org/10.18574/nyu/9781479845620.003.0030>

⁴¹ Terezin: Children of the Holocaust, n.d., "History of Terezin — Terezin: Children of the Holocaust," <http://www.terezin.org/the-history-of-terezin>.

⁴² Spiegel "Portrait of Wally: The U.S. Government's Role in Recovering Holocaust Looted Art."

⁴³ *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 240 (S.D.N.Y. 2009)

help to recover her artwork, but instead of assisting her, Leopold sought the painting for himself. In exchange for a Schiele painting from his private collection, the Belvedere gave Leopold the *Portrait of Wally*. Bondi's attempts to reclaim her painting through lawyers in London and Austria were unsuccessful, and she passed away in 1969 without regaining possession.⁴⁴

In 1994, the Leopold Museum was established, and Leopold's art collection, including *Portrait of Wally*, became a part of it. Later, in 1997, *Portrait of Wally* was showcased in a Schiele exhibit at MoMA. In the catalog, Leopold changed the painting's provenance. When the Bondi heirs discovered the exhibition, they asked MoMA to withdraw the work until legal action could take place. The MoMA declined the request, saying it was bound by a contract to display the portrait and return it to the Leopold Museum following the exhibition. After private negotiations failed and the New York Times published their article, the government took the necessary steps and intervened. District Attorney Robert M. Morgenthau issued a subpoena for the painting as part of an investigation, but the New York courts dismissed it. Following that decision, the U.S. Customs Service obtained a seizure warrant, overruling the court's decision. U.S. Attorney Mary Jo White filed a lawsuit claiming that the stolen property had been knowingly imported into the U.S., violating the National Stolen Property Act, and subject to forfeiture to the Government.⁴⁵ Once again, the U.S. Government implemented extensive measures to “restitute identifiable property to victims of Nazi persecution.”⁴⁶

In response, the Leopold Museum appealed the seizure, arguing that it violated New York State law. However, Chief Judge Michael B. Mukasey emphasized that according to the National Stolen Property Act, transportation of foreign commerce worth over \$5,000 known to

⁴⁴ Spiegler, “Portrait of Wally: The U.S. Government’s Role in Recovering Holocaust Looted Art.”

⁴⁵ Ibid, 282.

⁴⁶ Niehuss S.Ed, “International Law-Sovereign Immunity-The First Decade of the Tate Letter Policy”.

be stolen is prohibited.⁴⁷ Artwork loaned to a museum, even if it is reputable, is not exempt from the law. In the case of *Portrait of Wally*, the court made it clear that applying the Act under this interpretation was essential to upholding Congress's purpose in creating the Act and re-emphasizing the federal government's interest in the restitution of stolen property.

The court case *U.S. v. Portrait of Wally* illustrates the interconnectedness of the United States with Nazi-looted art restitution. Restitution of art has always been a crucial element of the United States' executive, legislative, and judicial prerogatives. The Government's policy to reverse forced transfers and return property taken from victims of Nazi persecution was established through the Tate letter, further supported by the Foreign Sovereign Immunities Act (FSIA) and upheld by the courts in *Bernstein v. Van Heyghen Freres Societe Anonyme*. While the United States' commitment to art restitution has been historically upheld, the effectiveness of their methods has been criticized.

Specifically, in *U.S. v. Portrait of Wally*, the Government's intervention in seizing private property under art restitution laws was called unfounded and counterproductive. According to the Washington Principles, in disputes related to Nazi-looted art, "steps should be taken expeditiously to achieve a just and fair solution."⁴⁸ However, *U.S. v. Portrait of Wally* lasted over a decade due to continuous appeals, a commonality within the United States judiciary. For instance, in this legal system, parties involved in a case must share all relevant information during the discovery process. This ensures that there are no surprises when the case goes to trial, and everyone involved is aware of the available evidence, allowing them to shape their arguments accordingly. Unfortunately, this approach can often be expensive and intrusive for the

⁴⁷ Ibid, 283.

⁴⁸ "Washington Conference Principles on Nazi-Confiscated Art - United States Department of State," United States Department of State, December 1, 2020, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>.

parties involved.⁴⁹ In contrast, European law, particularly Austrian law, takes a more focused approach. Parties are expected to present their best arguments and evidence promptly. While this approach is faster and less expensive, there is a risk that a party may overlook disclosing important information that could be detrimental to their case and not be known by the opposing party.⁵⁰

As a result, the discovery process for *U.S. v. Portrait of Wally* took several years to proceed to summary judgment. In this pre-trial appeal, both parties presented crucial facts related to the case to determine whether the case should proceed to trial or be dismissed. After examining the evidence regarding the *Portrait of Wally*, the District Court rejected the summary judgment motions presented by Austria and scheduled the case for trial in July 2010. A date more than eleven years after the U.S. subpoenaed the Portrait of Wally.⁵¹ However, just weeks before the scheduled trial, Leopold passed away. Although there is no public documentation of the following negotiations, it is undeniable that Leopold's death opened the door to the possibility of restitution. On July 20, 2010, the U.S. Attorney announced a settlement. The Leopold Foundation agreed to pay the Bondi heirs \$19 million for the right to keep and return the painting to Vienna. As of today, the *Portrait of Wally* still decorates the museum walls.⁵²

This settlement encapsulates the complexity of art restitution, even when they are resolved. On one hand, the Bondi family received compensation for the theft of their family property, and manipulation by Leopold was exposed. On the other hand, the painting in question remains in a museum dedicated to the man who stole it. Regardless of how one views the

⁴⁹ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 71-72.

⁵⁰ Ibid.

⁵¹ Ibid, 73-74.

⁵² Spiegler, "Portrait of Wally: The U.S. Government's Role in Recovering Holocaust Looted Art,".

outcome, the crucial role played by the United States in securing a form of restitution for the Bondis remains unquestionable. Without the intervention and seizure of the portrait by the U.S. government, this matter may have remained unresolved.

Therefore, why the U.S. government should play a role in such cases finds its answer in its historical commitment and proven ability. However, not every stolen artwork is loaned to the United States, and due to the United States taking a firm stance against Nazi-looted artworks, international museums have become highly conscious of lending pieces with questionable ethical backgrounds to them. Nevertheless, due to the United States exceptionally flexible and innovative legal system, a sovereign law enacted in 1979 was revisited in 2005 and employed to file a lawsuit for the restitution of a painting, not on U.S. soil.

Chapter 3: Beyond Sovereignty: FSIA's Blueprint for Reclaiming Stolen Art Illustrated by *Austria v. Altmann*

Maria Altmann is one name that will forever stand apart in the discussion of the WWII restitution endeavor, especially as many of the stories involving this topic pit families against institutions. Maria Altmann, an eighty-two-year-old widow, and family friend who was a lawyer, went against the entire nation of Austria to reclaim the portrait of her aunt, Adele. Maria was described by the press internationally as a “mild-mannered heiress of the Bloch-Bauer fortune had ‘fought like a lioness’ but had remained thoroughly ‘graceful’ and ‘loveable’ throughout.”⁵³ It was an ambitious endeavor that resonates with tales of a nation where the streets are said to be paved with gold. Nevertheless, the American dream proved true for some, and reclaiming “Women in Gold,” also known as the *Portrait of Adele Bloch-Bauer I*, became Altmann's dream.

Born as Maria Victoria Bloch in Vienna in 1916, she belonged to the prosperous Austrian Jewish Bloch family, with Gustav Bloch and Maria Therese Bauer as her parents. Notably, her uncle, Ferdinand Bloch-Bauer, was a prominent figure in the sugar industry and a patron of the arts. Ferdinand commissioned several pieces by Gustav Klimt, including two portraits of his wife these iconic paintings are now recognized as *Portrait of Adele Bloch-Bauer I* and *Portrait of Adele Bloch-Bauer II*.⁵⁴

Adele Bloch-Bauer passed away in 1925 due to meningitis. In her will, she wished Ferdinand to donate the paintings, including her portraits, to the Austrian national collections. This desire was unsurprising, as Adele considered herself as much an Austrian as Jewish.

⁵³ Sophie Lillie, “The Fortunate Possessor: The Case of Gustav Klimt’s Beethoven Frieze.” *In Rethinking Holocaust Justice: Essays across Disciplines*, edited by Norman J.W. Goda, 1st ed., 265–88. Berghahn Books, 2020. <https://doi.org/10.2307/j.ctvw048fq.17>.

⁵⁴ Charles H Brower, “Republic of Austria v. Altmann.” *The American Journal of International Law* 99, no. 1 (2005): 236–42. <https://doi.org/10.2307/3246102>.

However, the Austria inherited by her niece, Maria Bloch, vastly differed from the Austria Adele had cherished.⁵⁵

In 1937, Maria Bloch married Victor Altmann, but the Nazi takeover in 1938 cast a dark shadow over the newlyweds. While there is no indication that the Altmanns were immediately subjected to the horrendous Reibpartie, where Viennese Jews were forced to scrub sidewalks with toothbrushes on their hands and knees in front of mocking crowds⁵⁶, their prominence soon drew the attention of emerging Nazi authorities. Maria's husband, Victor, faced repeated arrests and mistreatment, and Ferdinand Bloch-Bauer was falsely accused of various offenses and fined.⁵⁷

On May 14, 1938, a judicial seizure order stripped Bloch-Bauer of the legal authority to dispose of his property. Erich Fuhrer, a local authority, was appointed administrator of the Bloch-Bauer estate and initiated the liquidation in 1939, coercing Altmann and her family out of their property. Their exquisite collection of Klimts was disassembled, and *Portrait of Adele Bloch-Bauer I* and *Apple Tree I* were traded to the Austrian Gallery. *Portrait of Adele Bloch-Bauer II* was sold in March 1943 to the Austrian Gallery, and the *House in Unterach am Attersee* was kept by Dr. Fuhrer for his private collection.⁵⁸

Maria Altmann and her husband fled Vienna in 1938, leaving her parents behind to start a new life in the U.S. They lived well for fifty-six years until her husband's passing in 1994. Around this time, significant steps were taken to facilitate WWII art restitution in Austria. These

⁵⁵ E. Randol Schoenberg, "Whose Art Is It Anyway?" In *Holocaust Restitution: Perspectives on the Litigation and Its Legacy*, edited by Michael J. Bazylar and Roger P. Alford, 288–94. NYU Press, 2006. <http://www.jstor.org/stable/j.ctt155jjnz.31>.

⁵⁶ For further information: <https://perspectives.ushmm.org/item/photograph-of-jews-cleaning-streets-in-vienna>

⁵⁷ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 87.

⁵⁸ ArThemis, "Six Klimt Paintings – Maria Altmann and Austria — Centre Du Droit De L'art," n.d., <https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria>.

newly adopted laws were praised at the Washington conference; however, they lacked in practice. While a commission was established to examine the provenance of paintings potentially subject to restitution, these laws prevented any claims for artwork return and completely excluded the victims or their heirs from the process.⁵⁹ Once again, international organizations demonstrated their ineffectiveness in facilitating art restitution.

Despite these challenges, the trend of art restitution continued, and investigations into questionable art ownership unfolded in Austria. In February 1998, Maria Altmann learned from Austrian investigative journalist Hubertus Czernin that she was the true heir to the Klimt paintings.⁶⁰ Determined to reclaim them, she and Eric Randol Schoenberg, a lawyer and a friend's son, attempted to sue the Austrian government in 1999. They argued that the government had retained the paintings based on Adele's will, which requested Ferdinand to donate them to the state. However, probate documents revealed this request as nonbinding since the paintings belonged to Ferdinand Bloch-Bauer, not Adele, during their seizure.⁶¹

Ferdinand, who fled Austria ahead of the Nazi annexation in 1938, died in Zurich in 1945, he named that his heirs, including Maria Altmann, would inherit the paintings. However, they could not recover the paintings following his death due to displacement and the war. As a result, the artworks remained in Vienna's Austrian Gallery at Belvedere Palace. In 1999, Altmann appealed to the Belvedere but was rejected. The Austrian government refused to intervene, insisting that her only recourse was legal action. Yet, this proved impractical under Austrian law, which required Altmann to post a bond proportional to the property's value—a

⁵⁹ Schoenberg, "Whose Art Is It Anyway?"

⁶⁰ Anne-Marie O'Conner, *The Lady in Gold: The Extraordinary Tale of Gustav Klimt's Masterpiece, Portrait of Adele Bloch-Bauer*, (New York: Knopf, 2012), 226.

⁶¹ Schoenberg, "Whose Art Is It Anyway?"

painting worth over \$150 million.⁶² Once again, Austria failed to provide justice for Maria Altmann. When dealing with art, cultural history plays a significant role in the objects of discussion. For Austria, these paintings, particularly the portrait of *Adele Bloch-Bauer*, encompassed what Austria was - a country of wealth and cultural significance. As such, “the Austrian government fought with everything it had to keep the [paintings], and Mrs. Altmann fought back with equal ferocity.”⁶³ With Austria refusing to allow Maria Altmann’s case to proceed, she and Schoenberg explored their only alternative—a lawsuit in the United States.

In 2000, Altmann brought her claim to the U.S. District Court for the Central District of California in Los Angeles, invoking the Foreign Sovereign Immunities Act’s (FSIA) jurisdiction over the Republic of Austria. She sought a declaration of ownership concerning six paintings: *Adele Bloch-Bauer I*, *Apple Tree I*, *Portrait of Adele Bloch-Bauer II*, *House in Unterach am Attersee*, and *Amalie Zuckerkandl*.

The court faced the challenge of determining the relevance of the FSIA, which was not enacted until 1976. The Tate Letter, published in 1952, played a crucial role in influencing the creation of the law. However, the actions in question occurred before either document. The court needed to determine if the Act and the Letter followed a “restrictive view” of sovereign immunity or a “retroactive view.”⁶⁴ Austria argued that the Tate Letter's policy should not be retroactively applied to events preceding it as it was created in light of certain events - *Bernstein v. Van Heyghen Freres Societe Anonyme*. However, through a detailed analysis of the Tate Letter's precedent, the courts affirmed that the FSIA could be applied to events predating the letter, reinforcing the United States' stance on art restitution. Additionally, the court rejected

⁶² O’Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 90.

⁶³ Nina Totenberg, “After Nazi Plunder, a Quest to Bring Home the ‘Woman in Gold,’” *NPR*, April 2, 2015, <https://www.npr.org/2015/04/02/396688350/after-nazi-plunder-a-quest-to-bring-the-woman-in-gold-home>.

⁶⁴ O’Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 90.

Austria's assertion that Maria Altmann should have initially exhausted her remedies in Austria.⁶⁵ According to Foreign Relations Laws, the exhaustion requirements are excused when domestic remedies are considered unachievable, inadequate, or unreasonably prolonged⁶⁶. The California court deemed the required bond exceeding the combined value of Maria Altmann's assets unattainable.

As the court rejected Austria's various appeals, Altmann needed to prove that FSIA applied to her inheritance. She needed to prove one of the three exceptions outlined in the law:

- (a) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which foreign state may purport to effect except in accordance with the terms of the waiver,
- (b) in which the action is based upon a commercial activity carried on in the United States by the foreign state or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
- (c) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in a commercial activity in the United States.⁶⁷

Austria declined to waive its immunity; therefore, Altmann's argument found promise in the third exception. Following the U.S. precedent set by *Siderman de Blake v. Republic of Argentina*, a valid seizure under international law requires three elements. The absence of these elements directly violates international law: "First, the taking must serve a public purpose; second, aliens

⁶⁵ Ibid, 91.

In the case of *Landgraf v. USI Film Products, Inc.*, the Supreme Court established that when a court considers whether a law should be applied retroactively, it should first check if Congress explicitly stated its temporal reach. Followed the Landgraf decision. The D.C. Circuit suggested that the Foreign Sovereign Immunities Act (FSIA) applies to events before the Tate Letter. Additionally, Prinz determined that the FSIA should apply to all cases decided after the law's enactment.

⁶⁶ Restatement (Third) of Foreign Relations Law, § 713, cmt. F (1986)

⁶⁷ Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1330(a)

must not be discriminated against or singled out for regulation by the state; and third, payment of just compensation must be made.”⁶⁸ The facts on how Austria acquired Altmann's property were deemed a clear violation of the law. Now, she had to establish that her claims were directed at an agency or instrumentality of the state engaged in commercial activity. Her lawyer argued that the act of authoring, endorsing, and publishing *Klimt's Women* in the United States alongside an English-language guidebook, which included photographs of Maria Altmann's looted paintings, exemplified commercial activity.⁶⁹ The District Court concurred with all the facts presented by Altmann's team and ruled in her favor. Furthermore, in the appeals process, the Ninth Circuit was assertive in upholding the lower court's decision, stating that...“because Appellants⁷⁰ profit from the Klimt paintings in the United States, by authority, promoting, and distributing books and other publications exploiting these very paintings, these actions are sufficient to constitute ‘commercial activity’ to satisfy FSIA, as well as the predicates for personal jurisdiction.”⁷¹

On December 14, 2002, the New York Times World Briefing: Europe read:

Dec. 14, 2002,

AUSTRIA: SUIT OVER SEIZED KLIMT PAINTINGS CONTINUES In a significant ruling on property seized during the Holocaust, the Austrian government failed in its attempt in a federal court in California to block a lawsuit over six paintings by the artist Gustav Klimt.⁷²

This exemplifies the international reach Maria Altmann had gained because of the FSIA law and the ability of the United States judicial system to hear her case. The US's involvement in art restitution extends beyond providing a means for individuals to seek restoration; it also establishes an international platform where they can reclaim their voices and gain recognition.

⁶⁸ *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992)

⁶⁹ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 90 – 95.

⁷⁰ The Republic of Austria

⁷¹ *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002)

⁷² The New York Times, “World Briefing: Europe,” December 14, 2002, <https://www.nytimes.com/2002/12/14/international/europe/world-briefing-europe.html?searchResultPosition=10>.

However, at this point the Republic of Austria continued their legal battle over *Portrait of Adele Bloch-Bauer II* and appealed to the United States Supreme Court.

In an interview with the Los Angeles Times addressing this appeal, Maria Altmann stated, “They will delay, delay, delay, hoping I will die...But I will do them the pleasure of staying alive.”⁷³ Altmann's unwavering determination profoundly highlighted the lasting importance of art restitution beyond just legal battles. It represented a deep search for recognition for the victims and families of the Holocaust. According to Altmann, the fight for restitution went beyond court proceedings and stood as a testament to the resilience and the unbreakable human spirit of victims of the Holocaust.

In 2004, the Supreme Court heard Altman’s case and affirmed that her interpretation of the FSIA, covering the events in question, was correct. The court's primary focus was addressing the retroactive application of the FSIA. In the final opinion, the court outlined the historical precedent of art restitution and set the stage for future cases. It emphasized that the dynamics shifted with the introduction of the Tate Letter, a time when the Foreign Sovereign Immunities Act (FSIA) did not exist, and the perspectives of the executive branch were undeniably supporting the victims. With the subsequent enactment of the FSIA by the legislative branch, the judiciary gained the authority to make determinations, considering *any* persuasive arguments presented by the State Department.⁷⁴

The outlook for art restitution within the United States appeared promising with this ruling. However, unlike the *Portrait of Wally*, which the US government held, the *Portrait of Adele Bloch-Bauer I* still hung in Vienna under the control of the Austrian government. In an

⁷³Anne-Marie O’Connor, “Fighting for Her Past - Los Angeles Times,” *Los Angeles Times*, March 1, 2019, <https://www.latimes.com/archives/la-xpm-2001-mar-20-me-40191-story.html>.

⁷⁴ *Altmann v. Republic of Austria*, 541 U.S. 677, 678 (2004)

interview with NPR, Schoenberg was praised for taking the case all the way to the U.S. Supreme Court and winning. “The next step, he told Altmann, should be arbitration in Vienna.”⁷⁵ Altmann was genuinely concerned that the Austrian government was waiting for her to pass away. Even if she proceeded with a trial and won, Austria could further appeal, extending the process as long as possible. So, she agreed to an arbitration in Vienne, strengthened by the United States Supreme Court’s decision. Altmann felt that Austria “would now come to their senses... They couldn't let it come to a trial because it would bring too much dirt out against” them.⁷⁶

The panel in Vienne had to decide on two questions: “How did Austria gain title to the paintings? And have the conditions for restitution under the 1998 law been met?”⁷⁷ Through the presentation of the evidence collected over the years and the experience Maria Altmann and Schoenberg had within US courts, in early 2006, the panel comprising three Austrian citizens ruled in Altmann's favor. Attributing the triumph solely to Austria's judicial system would be misleading, as the American legal framework has played a pivotal role since the beginning. The judiciary enabled Maria Altmann’s story to be heard, allowing art restitution into the media’s spotlight. Furthermore, it gave Maria Altmann’s claims legal credibility.

Through the main years of Maria Altmann’s legal battles, she convinced not only the United States that she owned her family fortune but also the Austrian people. This was seen through the billboards adorning the streets of Vienna in 2006, all saying farewell to Gustav

⁷⁵ Karen Grigsby Bates, “Maria Altmann, Who Sought Nazi-Looted Art, Dies,” *NPR*, February 9, 2011, <https://www.npr.org/2011/02/09/133629822/Maria-Altman-Who-Sought-Nazi-Looted-Art-Dies>.

⁷⁶ Totenberg, “After Nazi Plunder, a Quest to Bring Home the ‘Woman in Gold,’” *NPR*.

⁷⁷ Felicia R. Lee, “Arbitration Set for Case of Looted Art,” *The New York Times*, May 19, 2005, <https://www.nytimes.com/2005/05/19/arts/design/arbitration-set-for-case-of-looted-art.html?searchResultPosition=1>.

The 1998 Austrian law which allows paintings to be returned to their rightful owners if they were looted and not properly returned after the war, or were donated under duress after the war.

Klimt's masterpiece, the portrait of *Adele Bloch-Bauer II*.⁷⁸ This symbolic gesture encapsulated a moment of reflection and reckoning as Austria grappled with its historical legacy and sought to reconcile with past injustices because of a lawsuit beginning in California.

⁷⁸ Sophie Lillie, "The Fortunate Possessor: The Case of Gustav Klimt's Beethoven Frieze," In *Rethinking Holocaust Justice: Essays across Disciplines*, edited by Norman J.W. Goda, 1st ed., 280. Berghahn Books, 2020. <https://doi.org/10.2307/j.ctvw048fq.17>.

Chapter 4: The Dual Edges of FSIA: Successes and Challenges of *Cassirer v. Thyssen-Bornemisza Collection Foundation*

The case of *Cassirer v. Thyssen-Bornemisza* is a complex example of art restitution and the challenges of seeking justice for looted cultural heritage. The fight to reclaim *Rue Saint-Honoré in the Afternoon, Effect of Rain* (*Rue Saint-Honoré, après-midi, effect de pluie*) has lasted decades. This case demonstrates that while individual cases may not always result in the desired outcome, the U.S. legal system remains an effective and essential avenue for pursuing art restitution, offering a platform for advocacy and legal recourse. The provenance of the disputed painting, *Rue Saint-Honoré in the Afternoon, Effect of Rain*, dates back to April 11, 1900, when Paul Cassirer, an esteemed Jewish German art collector, acquired it from Paul Durand-Ruel, who served as Pissarro's primary dealer in Paris. This transaction marked the initial connection of the painting with the Cassirer family lineage. Subsequently, Julius Cassirer, another member of the family residing in Germany, became the next owner of the artwork. In a familial transfer, Julius Cassirer passed the painting to his daughter-in-law, Lilly Cassirer Neubauer, in 1926. As of 1939, Lilly and her husband, Otto Neubauer, resided in Germany, maintaining possession of the painting.⁷⁹

As the political climate in Germany became increasingly hostile, Lilly Cassirer Neubauer faced mounting difficulties securing a visa to leave the country. Like many other Jews during this period, Lilly found herself entangled in a struggle with the Nazi regime over her assets and possessions.⁸⁰ An official of the Reich Chamber of the Visual Arts, a member of the Rheinisch

⁷⁹ "Case Review: Cassirer V. Thyssen-Bornemisza Collection Foundation - Center for Art Law," Center for Art Law, January 19, 2024. <https://itsartlaw.org/2019/06/12/case-review-cassirer-v-thyssen-bornemisza-collection-foundation/>.

⁸⁰ O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 240-254.

Bergischer Kreis (RBK), obtained a warrant to search Lilly's home. This man, Jakob Scheidwimmer, was *interested* in buying the Pissarro painting. Lilly later testified:

I went along with it, although I knew this price didn't even remotely reflect its true value. Theoretically, I would have the option of trying to sell the painting to another Aryan art dealer.... Furthermore, we had to consider the possibility that Scheidwimmer, we weren't sure whether he had connections with the Gestapo [who] might take offense at our refusal to sell.⁸¹

The money she acquired from the forced sale, like all assets at that point, went into her blocked account. Lilly and Otto left Germany in July 1939.

Lilly Cassirer searched for her painting after World War II. In 1958, her efforts unveiled a heartbreaking truth: the painting had been lost due to persecution during the war. The German government paid Lilly DM 120,000 in compensation for her loss, but the settlement clarified that she still had the right to the property if it were ever found as long as she repaid the settlement. Lilly died in 1962 in Cleveland, Ohio, without ever seeing the painting again.⁸² In 2001, Lilly's grandson Claude learned that the painting had resurfaced in Madrid. The painting, *Rue Saint-Honoré, après-midi, effect de pluie* by Camille Pissarro, had been acquired by Baron Hans Heinrich Thyssen-Bornemisza, a Dutch-born Swiss industrialist, who had sold it and his vast art collection to the Kingdom of Spain in 1993.⁸³ The painting has since been displayed in the Museo Thyssen-Bornemisza in Madrid.

Claude Cassirer requested the return of the painting from Spain, but his request was unsurprisingly denied. In response to the inability to reclaim the painting in Spain, he filed a lawsuit in 2005 against the museum and the Kingdom of Spain in the U.S. District Court for the Southern District of California through the Foreign Sovereign Immunities Act (FSIA). They

⁸¹ Sullivan & Worcester, "Thyssen-Bornemisza Wins Pissarro Painting Sold Under Nazi Duress by Lilly Cassirer," *JD Supra*, January 15, 2024, <https://www.jdsupra.com/legalnews/thyssen-bornemisza-wins-pissarro-6613932/>.

⁸² O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted*, 240-254

⁸³ Center for Art Law, "Case Review: Cassirer V. Thyssen-Bornemisza Collection Foundation - Center for Art Law."

argued that because the Museo Thyssen-Bornemisza had engaged in commercial activity through borrowing artwork from American museums, accepting entrance fees from American visitors, selling various items to American citizens, and maintaining a website where people could buy admission tickets using American credit cards and view the paintings on display that Spain's sovereignty should be waived.⁸⁴

During the initial legal proceedings from 2006 to 2013, the District Court faced several challenges as Spain sought the dismissal of the suit. In 2006, Spain argued that the expropriation exception of the Foreign Sovereign Immunities Act (FSIA) was inapplicable because Spain had not breached any international law; it merely possessed the painting. Rejecting this argument, the District Court ruled in favor of the Cassirer family, determining that the expropriation exception under the act does not require that Spain be the entity directly responsible for the taking.⁸⁵ Even at this point, as the legal proceedings remain entangled in the lower courts of the United States, This case has far-reaching implications, highlighting the extensive influence of the United States judicial system beyond its borders. It exemplifies the capacity to confront and scrutinize past questionable practices, bringing them into the spotlight. Ronald S. Lauder, the World Jewish Congress (WJC) president years later, described, "the Museum's decision to exhaust every possible means of delay... [as] deplorable."⁸⁶ In accordance with Lauder, the Thyssen-Bornemisza Museum delayed once again in 2009, appealing for a full court review to re-evaluate the sufficient commercial activity in the United States and whether exhaustion of remedies was required. Despite these efforts, the district court denied Spain's motion to dismiss.⁸⁷ In the

⁸⁴ *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006)

⁸⁵ *Ibid.*

⁸⁶ "Ronald Lauder Urges Spanish Museum to Return Looted Painting to Jewish Owners - World Jewish Congress," World Jewish Congress, July 14, 2014, <https://www.worldjewishcongress.org/en/news/ronald-lauder-urges-spanish-museum-to-return-looted-painting-to-jewish-owners>.

⁸⁷ *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009)

subsequent appeals, the Ninth Circuit upheld the district court's decision and rejected Spain's argument for exhaustion of judicial remedies.⁸⁸

Claude Cassirer's passing in 2010 marked a pivotal shift, as his heirs continued the legal battle. They persisted in their efforts, taking their suit directly to the Thyssen-Bornemisza Museum, recognizing it as an agency or instrumentality of the Kingdom of Spain.⁸⁹ In 2013, the district court initially granted Thyssen-Bornemisza Museum's motion to dismiss based on a statute of limitations, but this decision was later reversed by the Ninth Circuit.⁹⁰ Lauder, at the time, utilized his international platform to urge for the return of Rue Saint-Honoré in the Afternoon, Effect of Rain to the Cassirers, “calling upon Spain to be a responsible member of the community of nations,”⁹¹ referencing the various international treaties Spain had signed towards the restitution of Holocaust Era related assets.⁹² However, despite a global call to settle, no agreement was reached, leading to additional legal battles. The case progressed from the initial application of the FSIA, which was deemed applicable, to a pivotal question: which law, Spanish or Californian, governed the dispute within the courts? Eventually, the case made its way to the Supreme Court in 2022, marking a significant development more than a decade after the initial case.

⁸⁸ Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010)

⁸⁹ Cassirer v. Thyssen-Bornemisza Collection, No. 12-56159 (9th Cir. 2013)

⁹⁰ Ibid.

⁹¹ World Jewish Congress, “Ronald Lauder Urges Spanish Museum to Return Looted Painting to Jewish Owners - World Jewish Congress.”

⁹² The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998.

United States Department of State. “2009 Terezin Declaration on Holocaust Era Assets and Related Issues - United States Department of State,” December 1, 2020. <https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/>.

The 2009 Terezin Declaration refers to a set of commitments made by representatives of 46 countries (including Spain) that addresses the wrongful seizure of property during the Holocaust and the need for its restitution and compensation.

The recent ruling by the Supreme Court was regarding a dispute over the ownership of a painting that once belonged to Lilly Cassirer. The painting was transferred several times over the years, which made the case complicated. Claude Cassirer claimed the painting to be his rightful property, while the Thyssen-Bornemisza Collection Foundation argued that they owned it. Each based their claims on their respective country's laws. For the Cassirers, California law recognizes that even a "good faith purchaser can never acquire good title to stolen property."⁹³ For Spain, the doctrine of "acquisition prescription" transferred ownership after six years of possession if the possessor were unaware that the property was stolen, rendering the painting theirs.⁹⁴ However, this particular law directly conflicts with the forth provision of the Washington Principles that states:

4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.⁹⁵

Instead of upholding the principles of this international treaty, Spain has chosen to prioritize its domestic laws, highlighting the limited international authority of such treaties.

The Supreme Court ultimately ruled in favor of Cassirer's heirs⁹⁶. They established that in an ownership dispute between two countries, the applicable choice-of-law rule the court should apply is not the one in which the defendant was a foreign-state actor but a private party⁹⁷.

⁹³ Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No. CV 05-3459-JFW, U.S. Supreme Court. Petition for writ of certiorari (2021)

⁹⁴ "Confronting Cultural Crimes: The Ongoing Battles to Restitute Nazi-Looted Art," *BJIL*, October 15, 2021, <https://www.berkeleyjournalofinternationallaw.com/post/confronting-cultural-crimes-the-ongoing-battles-to-restitute-nazi-looted-art>.

⁹⁵ The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998.

⁹⁶ Cassirer v. Thyssen-Bornemisza Collection Foundation, 596 U.S. No. 20-1566 (2022)

⁹⁷ "Erie Doctrine and Choice of Law – Choice of Law," *Law Shelf*, 596 U. S. CASSIRER v. THYSSEN-BORNEMISZA COLLECTION FOUNDATION (2022)

"Choice of law" refers to guidelines used to determine which jurisdiction's laws should govern a lawsuit. These questions typically arise in federal court cases based on diversity jurisdiction, where the plaintiff and defendant come from different states or countries. In this case, the Supreme Court ruled that neither the federal choice-of-law test nor the Spanish rule should be applied; California's rules should be followed, as it

This narrative resembles Maria Altmann, who embarked on a lengthy legal journey, culminating at the Supreme Court. For both, "a Washington courthouse [became] a Jewish family's last hope," a sentiment that resonated on an international scale.⁹⁸ However, following their legal victory, the Cassirer family diverged from seeking retribution in Spain where the painting is held, opting to pursue further litigation through the United States courts.

On January 9, 2024, after the U.S. Supreme Court sent the case back. The lower courts ruled in favor of the Thyssen-Bornemisza Collection in this lawsuit under the Foreign Sovereign Immunities Act. Following the Supreme Court's directive, the district court was required to apply California laws. However, within the state, when handling cases involving multiple jurisdictions, California's private international laws are prioritized, reflecting the fundamental principle that art is private property governed by civil law frameworks. The court used a "comparative impairment" approach to determine whether California's property laws or Spain's laws should apply.⁹⁹ This method involves several steps. First, it entails comparing the laws of relevant jurisdictions, namely Spain and California, which revealed significant disparities in their treatment of ownership laws. Second, the court evaluated the interests of each state, with California aiming to prevent the circulation of stolen goods and Spain seeking to ensure legal certainty for transactions within its borders. Finally, the court assessed which state's interests

falls under the jurisdiction of the private party disputes - the Cassirers. Under California's choice-of-law principles, if a conflict arises, courts analyze the respective interests of the jurisdictions involved to determine which would be more severely impaired if its laws were not applied in that particular case. The laws of the jurisdiction most adversely affected would then be applied.

⁹⁸ Liliana Martínez Polo, "La Batalla Por El Pissarro Robado Por Los Nazis," *El Tiempo*, January 19, 2022, <https://www.eltiempo.com/cultura/arte-y-teatro/la-batalla-legal-por-un-pissarro-robado-por-los-nazis-645798>. Translated by the author.

⁹⁹ CASSIRER V. THYSSEN-BORNEMISZA COLLECTION, No. 19-55616 (9th Cir. 2024)

would suffer greater harm if its laws weren't applied, ultimately determining that Spain's interests would be more adversely affected.¹⁰⁰

As a result, the court rejected the application of California law, which would have denied ownership based on the painting's theft history. Instead, it favored Spanish law, allowing ownership transfer under specific conditions, including good faith purchase and possession for a specified time. The California court applied Spanish Civil Code rules, recognizing the Thyssen Foundation as the rightful owner of the painting. Yet, despite the decision, the ongoing dialogue initiated within the courts remains open to this day. In a concurring opinion, Judge Callahan expressed that "she agreed with the result, but it was at odds with her moral compass, and Spain should have voluntarily relinquished the painting."¹⁰¹ This statement echoes a common theme observed in art restitution cases, where the acknowledgment of the painting's history under troubling circumstances is juxtaposed with the limitations of existing laws, which cannot compel Spain to return the painting.

While Spain's won the legal battle, disapproval emerged within its borders following the ruling. Bernardo Cremades, a lawyer representing the Federation of Jewish Communities in Spain (FCJE), expressed disbelief, stating in an article, "It's simply unbelievable that Spain is refusing to fulfill its international commitments."¹⁰² This sentiment resonates even among the younger generation, indicating a widespread concern within Spanish society about the implications of the decision. The Federation of Young Jews in Spain (FEJJE) has voiced its

¹⁰⁰ Accursio DIP, "Un Cuadro, Precioso, Robado Por Los Nazis Y Que Se Encuentra En Madrid Y Cuya Propiedad Es Decidida Por Un Tribunal De California. El Caso Cassirer (2024) |," January 21, 2024, <http://accursio.com/blog/?p=1782>.

¹⁰¹ Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, D.C. No. 2:05-cv-03459- JFW-E

¹⁰² Mia Jankowicz and Thibault Spirlet, "Jewish Groups in Spain Are Troubled by Their Government's Decision to Cling Onto a Painting Looted by the Nazis," *Business Insider*, January 24, 2024, <https://www.businessinsider.com/jewish-community-spain-wants-nazi-looted-painting-pissarro-returned-2024-1>.

objections, condemning the Spanish government's choice to retain possession of the painting. They argue that this decision “perpetuates a cycle of dehumanization.”¹⁰³ The positions adopted by both organizations underscore a heightened awareness and activism among diverse segments of Spanish society, all catalyzed by the court case initiated in the United States.

However, lawyers representing the Cassirers intend to pursue a review by an 11-judge panel of the Ninth Circuit following this decision. They stated in a press release early this year that the ruling “fails to explain how Spain has any interest in applying its laws to launder ownership of the spoils of war.”¹⁰⁴ The legal battle will continue embodying the rigorous nature of the legal process and avenues of legal recourse for individuals seeking restitution for looted artworks. The heightened attention gained by the Cassirer case has played a significant role in fueling ongoing discussions surrounding the restitution of looted artworks to their rightful owners, thereby advancing the cause of restitution. By navigating complex legal frameworks such as the Foreign Sovereign Immunities Act (FSIA), the Cassirer case has contributed valuable precedents to jurisprudence, offering guidance for future legal proceedings involving similar matters. Overall, although the painting was not returned, the case serves as a testament to the efficacy of the United States judicial system in hearing art restitution cases. Furthermore, it also emphasizes the country's considerable international impact in offering a stage for victims to make their voices heard worldwide. As the case currently progresses, the international community remains observant.

¹⁰³ Ibid.

¹⁰⁴ Jonathan Stempel, “Madrid Museum May Keep Picasso Painting Looted by Nazis, US appeals court rules.” *Reuters*, January 10, 2024. <https://www.reuters.com/legal/madrid-museum-may-keep-picasso-painting-looted-by-nazis-us-appeals-court-rules-2024-01-09/>.

Conclusion

This thesis has explored the prominent role of the United States in art restitution, revealing how its historical involvement, combined with the distinctive legal system, positions it uniquely as a capable leader in addressing the complex challenges associated with returning looted art from WWII. The treaties established to address art looting during World War II often proved ineffective due to their lack of legal enforceability, exemplified by Spain's refusal to return the Portrait of Wally. This highlights a critical shortfall in the global framework for art restitution, where legal systems frequently obstruct moral obligations.

However, in pursuing justice following WWII, the United States has assumed a pivotal role. From the war years onward, the U.S. has consistently leveraged its government to advocate for victims of Nazi theft. While executive press releases and unprecedented seizures of stolen art are commendable, the truly remarkable contribution lies in its legislative approach to restitution. The United States has carved out a definitive legal pathway for individuals seeking justice for Nazi-looted artworks through the enactment of the Foreign Sovereign Immunities Act (FSIA). This law allows U.S. courts to override other countries' sovereignty in art restitution cases, offering a unique mechanism for hearing restitution claims domestically. Consequently, the FSIA not only indicates the U.S.'s distinctive role in facilitating the return of looted art but also internationally legitimizes the efforts of claimants to reclaim familial properties.

Where international treaties have faltered, the Foreign Sovereign Immunities Act (FSIA) offers a legal balance that carefully navigates the sovereignty of nations while addressing the imperatives of international justice and accountability. This marks a pivotal departure from the traditional doctrine of absolute immunity, which shielded foreign states from legal actions in

foreign courts to a doctrine of restrictive immunity.¹⁰⁵ By explicitly defining exceptions rooted in universally recognized principles of international law, FSIA enriches the global dialogue on art restitution. It has been pivotal in numerous landmark cases, such as *Altmann v. Republic of Austria* over the *Portrait of Adele Bloch-Bauer I*, showcasing FSIA's crucial role in facilitating redress for historical wrongs. These instances underscore FSIA's contribution towards a more equitable and justice-focused approach by the United States, allowing for legal recourse in situations previously exempt due to absolute immunity, reinforcing the principles of law and international accountability.

The U.S. has been proactive in asserting jurisdiction over disputes involving looted artworks, even when such actions involve challenging foreign sovereigns. This is exemplified by landmark cases such as *U.S. v. Portrait of Wally*, where seizing the painting was enforced, and *Austria v. Altmann* and *Cassirer v. Thyssen-Bornemisza Collection Foundation*, which involved the implementation of the FSIA. These cases illustrate the complexities and challenges inherent in art restitution efforts, but at the same time demonstrate the effectiveness of the U.S. legal system in navigating these intricate issues. However, the effectiveness of the U.S. judicial system in influencing global restitution efforts varies. With the esteem of the United States Supreme Court showing signs of fluctuation internationally and domestically, these limitations are further emphasized.

Within the United States, “fewer than half of Americans (44%) now express a favorable opinion of the court, while a narrow majority (54%) have an unfavorable view, according to a

¹⁰⁵ Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?*, 281.

new Pew Research Center survey.”¹⁰⁶ Coupled with decreased citation of American legal decisions by international courts in certain areas, the U.S.'s global legal legitimacy seems dwindling.¹⁰⁷ Moreover, the Supreme Court, in the last two decades, has become rapidly more polarized, resulting in these unfavorable opinions of the court. They are often making decisions on highly controversial issues that deeply divide Americans, such as abortion, gun rights, healthcare, and voting laws. However, as shown throughout this thesis, the American public is not the only one watching. For example, following the Supreme Court’s decision to overturn *Roe v. Wade*, the international community spoke out, condemning its decision.¹⁰⁸ While the case is unrelated to art restitution, it puts the legitimacy the United States can offer individuals’ claims at risk. Yet, it is crucial to recognize that in other respects, such as the increasing citation of U.S. precedent by the High Court of Australia, there is evidence of the continued relevance and impact of U.S. legal thought on a global scale¹⁰⁹. This suggests the perceived decline in U.S. judicial influence may be more nuanced.

In light of these considerations, it becomes evident that the path forward requires more than leveraging the strengths of the U.S. legal system. The limitations of the FSIA, coupled with the ongoing debate over the application of domestic vs. international law in restitution cases, shows the need for a more cohesive and globally accepted framework for addressing looted art. Addressing the restitution of looted art demands a concerted effort that transcends national

¹⁰⁶ Pew Research Center, “Favorable Views of Supreme Court Fall to Historic Low,” July 21, 2023, <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/>.

¹⁰⁷ Adam Liptak, “U.S. Court Is Now Guiding Fewer Nations,” *The New York Times*, September 18, 2008, <https://www.nytimes.com/2008/09/18/us/18legal.html>.

¹⁰⁸ Jones, Zoe Christen. “World Leaders React to the U.S. Supreme Court’s Decision to Overturn *Roe V. Wade*.” CBS News, June 24, 2022. <https://www.cbsnews.com/news/supreme-court-roe-v-wade-abortion-rights-international-response/>.

¹⁰⁹ Aaron B Aft, “Respect My Authority: Analyzing Claims of Diminished U.S. Supreme Court Influence Abroad.” *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 421–54. <https://doi.org/10.2979/indjglolegstu.18.1.421>.

boundaries and legal jurisdictions. It calls for developing global norms and practices that legally bind nations to their commitments to justice and historical rectification. However, until such treaties can be created, the United States remains a critical player in this endeavor with its history of involvement in restitution efforts and its influential, unique legal system.

Bibliography

Accursio DIP, “Un Cuadro, Precioso, Robado Por Los Nazis Y Que Se Encuentra En Madrid Y Cuya Propiedad Es Decidida Por Un Tribunal De California. El Caso Cassirer (2024) |,” January 21, 2024, <http://accursio.com/blog/?p=1782>.

Achebe, Ifeanyi. *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?* 13 Md. J. Int'l L. 247 (1989). <http://digitalcommons.law.umaryland.edu/mjil/vol13/iss2/4>.

Aft, Aaron B. “Respect My Authority: Analyzing Claims of Diminished U.S. Supreme Court Influence Abroad.” *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 421–54. <https://doi.org/10.2979/indjglolegstu.18.1.421>.

Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002)

Altmann v. Republic of Austria, 541 U.S. 677, 678 (2004)

ArThemis. “Six Klimt Paintings – Maria Altmann and Austria — Centre Du Droit De L’art,” n.d.,

<https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria>.

Bates, Karen Grigsby. “Maria Altmann, Who Sought Nazi-Looted Art, Dies,” *NPR*, February 9, 2011, <https://www.npr.org/2011/02/09/133629822/Maria-Altman-Who-Sought-Nazi-Looted-Art-Dies>.

Bazyler, Michael J., and Roger P. Alford, eds. *Holocaust Restitution: Perspectives on the Litigation and Its Legacy*. NYU Press, 2006. <http://www.jstor.org/stable/j.ctt155jjnz>.

Bishop, William W. “Bernstein v. Van Heyghen Freres Societe Anonyme.” *The American Journal of International Law* 42, no. 1 (1948): 217. <https://doi.org/10.2307/2193593>.

Brower, Charles H. “Republic of Austria v. Altmann.” *The American Journal of International Law* 99, no. 1 (2005): 236–42. <https://doi.org/10.2307/3246102>.

Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157 (C.D. Cal. 2006)

Cassirer v. Kingdom of Spain, 580 F.3d 1048 (9th Cir. 2009)

Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010)

Cassirer v. Thyssen-Bornemisza Collection, No. 12-56159 (9th Cir. 2013)

CASSIRER V. THYSSEN-BORNEMISZA COLLECTION, No. 19-55616 (9th Cir. 2024)

Cassirer v. Thyssen-Bornemisza Collection Foundation, 596 U.S, No. 20-1566 (2022)

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No. CV 05-3459-JFW, U.S. Supreme Court. Petition for writ of certiorari (2021)

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, D.C. No. 2:05-cv-03459- JFW-E

Center for Art Law. “Case Review: Cassirer V. Thyssen-Bornemisza Collection Foundation – Center for Art Law.” January 19, 2024. <https://itsartlaw.org/2019/06/12/case-review-cassirer-v-thyssen-bornemisza-collection-foundation/>.

Commission for Looted Art in Europe. “Vilnius Forum Declaration.”

<https://www.lootedartcommission.com/vilnius-forum>

“Confronting Cultural Crimes: The Ongoing Battles to Restitute Nazi-Looted Art,” *BJIL*,

October 15, 2021, <https://www.berkeleyjournalofinternationallaw.com/post/confronting-cultural-crimes-the-ongoing-battles-to-restitute-nazi-looted-art>.

Driessen, Dennis. “St Petersburg: Rubens Looted from Germany Discovered at Hermitage.” *CODART*. December 20, 2004.

<https://www.codart.nl/museums/st-petersburg-rubens-looted-from-germany-discovered-at-hermitage/>

- Edsel, Robert M. *Rescuing Da Vinci: Hitler and the Nazis Stole Europe's Great Art: America and Her Allies Recovered It*. Dallas: Laurel Pub. 2006.
- Feldman, Mark B. "The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View." *The International and Comparative Law Quarterly* 35, no. 2 (1986): 302–19. <http://www.jstor.org/stable/759230>.
- Foreign Relations of the United States: Diplomatic Papers, General, Volume I, Document 456. Office of the Historian, Foreign Service Institute United States Department of State. 1943. <https://history.state.gov/historicaldocuments/frus1943v01/d456>
- Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1330(a) (1976).
- Giardini, Giuditta. "The History of Ius Praedae and Its Decline | the Columbia Journal of Law & the Arts". *The Columbia Journal of Law & the Arts*. August 2, 2019. <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/118>
- Jankowicz, Mia. Spirlet, Thibault, "Jewish Groups in Spain Are Troubled by Their Government's Decision to Cling Onto a Painting Looted by the Nazis," *Business Insider*, January 24, 2024, <https://www.businessinsider.com/jewish-community-spain-wants-nazi-looted-painting-pissarro-returned-2024-1>.
- Jones, Zoe Christen. "World Leaders React to the U.S. Supreme Court's Decision to Overturn Roe V. Wade." *CBS News*, June 24, 2022. <https://www.cbsnews.com/news/supreme-court-roe-v-wade-abortion-rights-international-response/>.
- Kaye, Lawrence M. "A Quick Glance at the Schiele Paintings", 10 DEPAUL-LCA J. ART OF ENT. L & POL'Y 11, 13 (1999).
- Kunzelman, Charles J. "Some Trials, Tribulations, and Successes of the Monuments, Fine Arts

and Archives Teams in the European Theatre During WWII.” *Military Affairs* 52, no. 2 (1988): 56–60. <https://doi.org/10.2307/1988039>.

Law Shelf. “Erie Doctrine and Choice of Law – Choice of Law,” 596 U. S. CASSIRER v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION (2022)

Lee, Felicia R. “Arbitration Set for Case of Looted Art,” *The New York Times*, May 19, 2005,

<https://www.nytimes.com/2005/05/19/arts/design/arbitration-set-for-case-of-looted-art.html?searchResultPosition=1>.

Lillie, Sophie. “The Fortunate Possessor: The Case of Gustav Klimt’s Beethoven Frieze.” In

Rethinking Holocaust Justice: Essays across Disciplines, edited by Norman J.W. Goda, 1st ed., 280. Berghahn Books, 2020. <https://doi.org/10.2307/j.ctvw048fq.17>.

Liptak, Adam “U.S. Court Is Now Guiding Fewer Nations,” *The New York Times*, September

18, 2008, <https://www.nytimes.com/2008/09/18/us/18legal.html>.

Menzel v. List, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966)

Nadeau, Erik. Echeona, Christina. “Art Theft and Modern Restitution in International

Law.” *SCBC*. April 28, 2023. <https://www.scbc-law.org/post/art-theft-and-modern-restitution-in-international-law>.

Niehuss S.Ed. John M, “International Law-Soverign Immunity-The First Decade of the Tate

Letter Policy”, *Mich. L. Rev*, vol. 60. 1142 (1962).

O’Connor, Anne-Marie. “Fighting for Her Past - Los Angeles Times,” *Los Angeles Times*,

March 1, 2019, <https://www.latimes.com/archives/la-xpm-2001-mar-20-me-40191-story.html>.

- O’Conner, Anne-Marie. *The Lady in Gold: The Extraordinary Tale of Gustav Klimt’s Masterpiece, Portrait of Adele Bloch-Bauer*. New York. Knopf, 2012.
- O’Donnell, Nicholas. *A Tragic Fate : Law and Ethics in the Battle over Nazi-Looted Art*. American Bar Association, 2017.
- Pew Research Center. “Favorable Views of Supreme Court Fall to Historic Low | Pew Research Center,” July 21, 2023, <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/>.
- Polo, Liliana Martínez. “La Batalla Por El Pissarro Robado Por Los Nazis,” *El Tiempo*, January 19, 2022, <https://www.eltiempo.com/cultura/arte-y-teatro/la-batalla-legal-por-un-pissarro-robado-por-los-nazis-645798>.
- Republic of Austria v. Altman, 541 U.S. 677 (2004)
- Restatement (Third) of Foreign Relations Law, § 713, cmt. F (1986)
- Rothfeld, Anne. “The Holocaust Records Preservation Project,” *Prologue Magazine*, Vol. 34, No. 2, (Summer 2002), <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1>.
- Rubens, Paul. *Die Briefe des P. P. Rubens*. Translated by Vienna O. Zo. Letter no. CCXVIII, p. 461-463, after the Italian original, [in:] Bottari Raccolta di Lettere sulla Pittura, Scultura et Architectura, Milano 1822, p. 525, 1918.
- Schoenberg, E. Randol. “Whose Art Is It Anyway?” In *Holocaust Restitution: Perspectives on the Litigation and Its Legacy*, edited by Michael J. Bazylar and Roger P. Alford, 288–94. NYU Press, 2006. <http://www.jstor.org/stable/j.ctt155jjnz.31>.

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992)

Spiegler, Howard N.. "25. Portrait of Wally: The U.S. Government's Role in Recovering

Holocaust Looted Art" In *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* edited by Michael J. Bazylar and Roger P. Alford, 280-287. New York, USA: New York University Press, 2005.

<https://doi.org/10.18574/nyu/9781479845620.003.0030>

“Statement of Glenn D. Lowry, Director of Museum of Modern Art, New York”. Holocaust

Assets Hearings Before the H. Comm. on Banking and Financial Services, 106th Cong. 95 (2000).

Stempel, Jonathan. “Madrid museum may keep Pissarro painting looted by Nazis, US appeals court rules.” *Reuters*, January 10, 2024. <https://www.reuters.com/legal/madrid-museum-may-keep-pissarro-painting-looted-by-nazis-us-appeals-court-rules-2024-01-09/>.

Sullivan & Worcester, “Thyssen-Bornemisza Wins Pissarro Painting Sold Under Nazi Duress by Lilly Cassirer,” *JD Supra*, January 15, 2024, <https://www.jdsupra.com/legalnews/thyssen-bornemisza-wins-pissarro-6613932/>.

Terezin: Children of the Holocaust, n.d., “History of Terezin — Terezin: Children of the Holocaust,” <http://www.terezin.org/the-history-of-terezin>.

Totenberg, Nina . “After Nazi Plunder, a Quest to Bring Home the ‘Woman in Gold,’” *NPR*, April 2, 2015, <https://www.npr.org/2015/04/02/396688350/after-nazi-plunder-a-quest-to-bring-the-woman-in-gold-home>.

The New York Times. “World Briefing: Europe.” December 14, 2002.

<https://www.nytimes.com/2002/12/14/international/europe/world-briefing-europe.html?searchResultPosition=10>.

The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998.

United States Department of State. “2009 Terezin Declaration on Holocaust Era Assets and Related Issues - United States Department of State,” December 1, 2020.

<https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/>.

United States Holocaust Memorial Museum. “‘Degenerate’ Art” Holocaust Encyclopedia. Last modified June 8, 2020. <https://encyclopedia.ushmm.org/content/en/article/degenerate-art-1#nazification-of-german-culture-0>.

U.S. v. Portrait of Wally, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

“Washington Conference Principles on Nazi-Confiscated Art - United States Department of State,” *United States Department of State*, December 1, 2020,

<https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>.

World Jewish Congress, “Ronald Lauder Urges Spanish Museum to Return Looted Painting to Jewish Owners - World Jewish Congress,” July 14, 2014, <https://www.worldjewishcongress.org/en/news/ronald-lauder-urges-spanish-museum-to-return-looted-painting-to-jewish-owners>.

Zander, Michael. “The Act of State Doctrine.” *The American Journal of International Law* 53, no. 4 (1959): 831. <https://doi.org/10.2307/2195753>.